BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

BD LAWSON PARTNERS LP AND BD VILLAGE PARTNERS LP, Petitioners, v. CITY OF BLACK DIAMOND, Respondent.	**CASE No. 14-3-0007** **ORDER OF DISMISSAL**

SYNOPSIS

The City adopted, by ordinance, a General Governmental Facilities Plan "in order to review, evaluate, consider and discuss this Plan, as one of the initial steps toward adoption of a [mitigations fee]." Petitioners argued that the ordinance was a de facto Comprehensive Plan Amendment adopted in violation of various GMA goals and citizen participation requirements. Because the legal effect of the ordinance did not require a particular legislative outcome that would amend or override the City's existing comprehensive plan or development regulations, the Board found it was not a de facto amendment. The case was dismissed because the Board lacked jurisdiction.

Petitioners BD Lawson Partners LP and BD Village Partners LP filed a Petition for Review against the City of Black Diamond on May 30, 2014. The challenged action is the City of Black Diamond's adoption of Ordinance No 14-1026 on April 3, 2014. The Ordinance adopted a General Facilities Plan which purpose is, by the plain language of the ordinance, to "review, evaluate, consider and discuss this Plan, as one of the initial steps toward adoption of a General [Government] Facilities Mitigation Fee."[1]

[1] PFR (May 30, 2014) at 1-2; Ordinance No. 14-1026 at 1; See City's Motion to Dismiss (June 25, 2014) at 1.

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The Petition for Review (PFR) asked, *inter alia*, "whether the Growth Management Hearings Board ("Board") has jurisdiction over this Petition for Review – i.e., whether the Ordinance has any legal effect that creates and/or amends a "comprehensive plan" or "development regulation" as those terms are defined in RCW 36.70A.030?"[2]

I. PROCEDURAL HISTORY

This matter came before the Board on Respondent's June 25, 2014, motion to dismiss the Petition for Review (PFR) as frivolous and for Petitioners' lack of standing. On July 24, Petitioners filed their own motion asking the Board to find that Ordinance 14-1026 was a *de facto amendment* to the City's Comprehensive Plan, thus giving the Board jurisdiction under RCW 36.70A. The City's Response to Petitioners' motion was received July 30, 2014, and Petitioners replied August 7, 2014. Petitioners' Response opposing the City's motion to dismiss was received July 31, 2014, to which the City did not reply.

II. BACKGROUND

The City approved two Master Plan Developments (MPDs) in 2010. In 2011, the City entered into development agreements requiring that the City commission a study regarding improvements to general governmental facilities necessary to accommodate the projected growth for the purpose of establishing mitigation fee rates.[3] The agreements required the City to complete a General Governmental Facilities Plan (the Plan) within twelve months of commissioning the study.[4] The City commissioned the study on April 13, 2013. The Plan was published March 26, 2014, and adopted by Ordinance in April 3, 2014 "in order to review, evaluate, consider and discuss this Plan, as one of the initial steps toward adoption of a [mitigations fee]."[5] The Ordinance became effective April 11, 2014, and Petitioners filed their PFR on April 30, 2014. In addition, these same Petitioners filed an action in King

[2] Legal Issue 1, PFR (May 30, 2014) at 3.
[3] Respondent's Motion to Dismiss (June 25, 2014) at 2.
[4] Respondent's Motion to Dismiss (June 25, 2014) at 2-3.
[5] PFR (May 30, 2014) at 1-2; Respondent's Motion to Dismiss (June 25, 2014) at 1.

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County Superior Court seeking, inter alia, a declaratory judgment under chapter 7.24 RCW that the Ordinance has no operative effect and as such is not a final appealable decision.[6]

III. JURISDICTION

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2). The Board finds the Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2)(b).

WAC 242-03-550(1) permits "dispositive motions on a limited record to determine the Board's jurisdiction." The parties here have filed cross motions on jurisdiction. Matters subject to jurisdiction of the Growth Management Hearings Board (GMHB) are established under RCW 36.70A.280(1)[7] and RCW 36.70A..290(1).[8] This is reinforced by the exclusions from the LUPA process in RCW 36.70C.020, RCW 36.70C.030, and RCW 36.70B.020(4). Under RCW 36. 70A.290(1), the Board shall hear "[a]ll petitions relating to whether or not an adopted comprehensive plan development regulation, or permanent amendment thereto is in compliance with the goals and requirements of [the GMA, SEPA or SMA]."

The parties agree that the challenged Ordinance did not adopt a fee schedule or enact any fees,[9] but the Petitioners contend it enacted a new level of service standards that will ultimately determine fees. The City contends that the Ordinance is plain on its face, describing the general facilities plan as a discussion document.[10] The City urges the Board to find the PFR and Petitioners' dispositive motion frivolous.[11] Petitioners argue that it was

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[6] Respondent's Motion to Dismiss (July 25, 2014) at 4; Respondent's Ex. A: Complaint for Declaratory Judgment, *BD Lawson Partners v. Black Diamond*, (May22, 2014) at 2.

[7] RCW 36.70A.280(1) provides in pertinent part:

> The growth management hearings board shall hear and determine only those petitions alleging … [t]hat, except as provided otherwise by this subsection, a . . . city planning under this chapter is not in compliance with the requirements of this chapter [GMA] . . . as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040. . . .

[8] RCW 36.70A.290(1) states that the Board hears "[a]ll petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of [the GMA, SEPA, or SMA]."

[9] PFR (May 30, 2014) at 2; Respondent's Motion to Dismiss (June 25, 2014) at 2.

[10] Respondent's Motion to Dismiss (June 25, 2014) at 1-2, 4

[11] Respondent's Motion to Dismiss (June 25, 2014) at 1, 6; Respondent's Response to Petitioners' Dispositive Motion (July 30, 2014) at 4, 8.

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necessary to file the PFR "as a precautionary measure"[12] to determine if the Ordinance has any legal effect that might later be binding on the City or Petitioners.[13]

Both parties cite to *Alexanderson v. Board of Clark County Commissioners,*[14] but come to opposite conclusions as to whether the Ordinance constitutes a *de facto* amendment to the City's comprehensive plan.[15] Petitioners seek to determine whether Ordinance No 14-1206 **functions** as an amendment of the City's development regulations, alleging that the level of service standards used in the Plan are inconsistent with those of the Comprehensive Plan.[16] The City responds that the Ordinance here was adopted for discussion purposes prior to adopting a fee schedule[17] and has no operative effect.[18]

The Board finds that there is a legitimate question of law at issue and will not find Petitioners' challenge frivolous.

As to the Board's jurisdiction, the threshold consideration is whether the City's action in adopting the challenged ordinance qualifies as a *de facto* amendment to the City's Comprehensive Plan. If the Ordinance is a *de facto* amendment, the Board has jurisdiction under RCW 36.70A.280.

De Facto Amendment of Comprehensive Plan

In *Alexanderson v. Board of Clark County Commissioners*[19] the Court of Appeals ruled that a Memorandum of Understanding between Clark County and the Cowlitz Tribe for provision of water service to a proposed development was a de facto amendment to the County's comprehensive plan policy prohibiting such water service because it required the

[12] PFR (May 30, 2014) at 1, 2.
[13] PFR (May 30, 2014) at 2.
[14] 135 Wn. App. 541, 144 P.3d 1219 (2006).
[15] Petitioners' Dispositive Motion Establishing Jurisdiction (June 24, 2014) at 5-8; City's Response to Petitioners' Dispositive Motion at 6-7; Petitioners' Response to City's Motion to Dismiss (July 31, 2014) at 4.
[16] PFR at 2; Respondent's Ex. A: Complaint for Declaratory Judgment, *BD Lawson Partners v. Black Diamond* (May 22, 2014) at 5.
[17] Respondent's Motion to Dismiss (June 25, 2014) at 1, 5.
[18] Respondent's Motion to Dismiss (June 25, 2014) at 2.
[19] *Alexanderson v Board of Clark County Commissioners,* 135 Wn. App. 541, 548-9, 144 P.3d 1219 (2006).

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County to act inconsistently with its planning policies.[20] The Court reversed the Board's dismissal for lack of jurisdiction and remanded for Board decision on the merits.

In *Your Snoqualmie Valley v. City of Snoqualmie*,[21] as in *Alexanderson*, the City had signed an MOU with an outside entity. Although the language of the MOU did not explicitly amend a goal of the County's comprehensive plan, one section had the actual effect of doing so. Because it created a direct conflict between the City's comprehensive plan annexation policies, which required an annexation implementation plan prior to approval of a proposed annexation, and the Resolution's agreement to annex first and "defer applying the comprehensive plan annexation policies," the Board found that section of the MOU had the legal effect of amending the plan. Thus, that section constituted a *de facto* amendment and the Board had jurisdiction. Further, the MOU was not simply a development agreement, because it would override an express requirement of the comprehensive plan. [22]

However, the Board in *Your Snoqualmie Valley* found that another section of the City's challenged Resolution, proposed shoreline designations, were not *de facto* amendments because the proposed designations did not dictate a particular legislative result. Likewise, in *City of Lake Stevens v. Snohomish,*[23] the Board distinguished a City's Resolution from the MOU in *Alexanderson*, finding that it did not constitute an enforceable agreement because it did not involve two entitles.[24] Although the Board noted that a unilateral action may constitute an amendment, the Resolution in *Lake Stevens* was found to have merely directed staff to prepare amendments for the Council's future consideration because the City did not presently have planning jurisdiction over the land in question.[25]

Summarizing from *Your Snoqualmie Valley* and *Lake Stevens,* the Board identifies the following principles as critical to the *Alexanderson* analysis:

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[20] *Alexanderson* at 548-9.
[21] *Your Snoqualmie Valley v. City of Snoqualmie*, Order on Motions, GMHB Case No 11-3-0012 (March 8, 2012)
[22] It has long been held that the Board does not have jurisdiction over development agreements; *See Citizens for Mount Vernon v City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997); *City of Burien v CGMHB*, 113 Wn. App. 376, 53 P.3d 1028 (2002).
[23] *Lake Stevens v. Snohomish,* Order on Motions, GMHB Case no. 09-3-0008 (July 6, 2009) at 4-5.
[24] *Lake Stevens v. Snohomish,* Order on Motions, GMHB Case no. 09-3-0008 (July 6, 2009) at 4.
[25] *Lake Stevens v. Snohomish,* Order on Motions, GMHB Case no. 09-3-0008 (July 6, 2009) at 4.

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- The explicit language of the City's action is not dispositive. [26]
- Whether or not an action is a *de facto* amendment depends on the actual, **legal effect** of the action. [27]
- Although a unilateral action may constitute an amendment, the actual legal effect must **require** a particular legislative result.[28]

Looking to the first principle, the Board notes that neither the fact that Black Diamond passed an Ordinance adopting a Government Facilities Plan, or the fact that the explicit language of the Ordinance declared the action to be only for discussion purposes, is dispositive. Similarly inconclusive is the fact that the action doesn't constitute an enforceable agreement between two entities.

On the one hand, in contrast to *Lake Stevens*, Black Diamond does have planning authority over the area in question. On the other hand, as in *Your Snoqualmie Valley,* the possible amendments to the Black Diamond comprehensive plan or Municipal Code are not even specified, let alone enacted. Petitioners infer changes to the level of service requirements used in the Plan, but the Board's reading of the Ordinance and adopted Plan does not reveal either (1) specific changes to existing code, or (2) requirements that will override the City's Comprehensive Plan. Accordingly, Petitioners will yet have opportunities to comment on such plan or code revisions and/or the adoption of mitigation fees.[29]

The Board has consistently rejected challenges to city or county resolutions or ordinances that do not enact plans or regulations but simply constitute part of the decision process.[30] Thus in *Six Kilns v. City of Sumner,*[31] a resolution authorizing the Mayor to

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[26] *Your Snoqualmie Valley*, Order on Motions, GMHB Case No 11-3-0012 (March 8, 2012) at 9.
[27] *Your Snoqualmie Valley*, Order on Motions, GMHB Case No 11-3-0012 (March 8, 2012) at 12, citing *Alexanderson* at 548-50.
[28] *Alexanderson at 548-9; Lake Stevens v. Snohomish,* Order on Motions, GMHB Case No. 09-3-0008 (July 6, 2009) at 4; *Your Snoqualmie Valley*, Order on Motions, GMHB Case No 11-3-0012 (March 8, 2012) at 12, citing *Alexanderson* at 548-50.
[29] Challenges to adoption of impact fees must be brought in Superior Court under Chapter 82.02 RCW and are not within the jurisdiction of the Growth Management Hearings Board.
[30] *Douglas Tooley v. Governor Christine Gregoire and City of Seattle,* GMHB Case No. 11-3-0008, Order on Dispositive Motions (November 8, 2011), at 10, citing cases.
[31] GMHB Case No. 13-3-0005, Order of Dismissal on Motions (July 16, 2013), at 8-9.

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negotiate sale of a municipal golf course for future City Council consideration, was not a de facto amendment of the Parks Plan. "Sumner's challenged Resolution is not a final action. To the extent Six Kilns argues the Comprehensive Plan or Parks and Open Space Plan may need to be amended to remove reference to the Golf Course upon sale of the property, the question is not yet ripe."

The Board finds that adoption of Ordinance14-1206 did not, *de facto,* amend the City's Comprehensive Plan.

The Boards finds that this matter will not be ripe for review until and unless the City enacts a development regulation, or comprehensive plan amendment under 36.70A.040.

Conclusions

The Board finds that the PFR is not frivolous.

The Board finds that there has been no amendment, *de facto* or otherwise, to the City's Comprehensive Plan.

The Boards finds that this matter is not ripe for review.

The Board concludes that it does not have jurisdiction under RCW 36. 70A.280(1).

IV. ORDER ON MOTIONS

Based upon review of the GMA, the Board's Rules of Practice and Procedure, briefings and exhibits submitted by the parties, case law and prior decisions of this Board, and having deliberated on the matter, the Board enters the following ORDER:

1. The Petitioners' Motion to Establish Jurisdiction is **denied.**
2. The City of Black Diamond's Motion to Dismiss is **granted.**
3. GMHB Case No. 14-3-0007 is **closed.**

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So ORDERED this 18th day of August, 2014.

Cheryl Pflug, Presiding Officer

Margaret Pageler, Board Member

Charles Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[32]

[32] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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